U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date Issued: September 16, 1998
Case No.: 1997-INA-366

In the Matter of:

MIRON COSTIN,
Employer,

on behalf of

CRISTINA RUSU,
Alien.

Appearances: Mary E. Orr, Esq.,
for Employer and Alien

Certifying Officer: Rebecca Marsh-Day, California

Before: Burke, Guill and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam: Employer, a private householder, requests review of a denial of its application for Alien Labor Certification. The job opportunity, as stated by Employer, required two years of experience in the job offered and submission of a list of personal references. The employee would work 40 hours per week for a wage of $12.17 per hour and five hours of overtime per week for a wage of one and a half times the basic wage of $12.17. The job duties were described as follows:

> The occupant of this position will be required to cook, season and prepare a variety of meat, fish, chicken dishes according to my instructions and prescribed Romanian/continental recipes ("sarmale" - stuff[ed] cabbage). Will plan menus and order foodstuffs. Will serve meals (lunch and dinner) for a family of four and guests. Will clean up after the meals including the kitchen, pots, pans. Will be required to determine how many will be at each meal in order to properly plan the menu.

(AF 16).

In the Notice of Findings ("NOF"), the CO found the application in violation of 20

C.F.R. §§ 656.3 and 656.21 (b)(2)(i)(A). There is a question whether Employer has a current job opening, operates an ongoing business, and/or can provide permanent, full-time employment to
which U.S. workers can be referred. Further, the 45-hour work requirement is also considered restrictive. (AF 11-14).

The CO required Employer to provide evidence establishing that the job offer meets the definition of full-time employment. Further, to rebut the finding that the 45 hours per week requirement is restrictive the CO requested that Employer demonstrate "business necessity," or prove that the requirement is common for the occupation in the United States.

In its rebuttal, Employer submitted a letter which asserted that the position was a genuine full-time position and that the CO was abusing its authority by requesting proof that the position merited full-time employment. In response to the finding that the 45-hour work week was restrictive, Employer answered that five of those hours are for unpaid lunchtime, therefore the employee only worked the normal 40 hours per week. (AF 9-10).

In a supplemental NOF, the CO again asserted that the application failed to demonstrate circumstances calling for a permanent, full-time domestic cook, and that there was no evidence submitted documenting the business necessity of a 45-hour work week. The CO added that the foreign specialty cooking requirement referred to in the Form ETA 750A is a preference for Employer's convenience, but not a business necessity. Thus, the certification was denied for failure to establish the existence of a bonafide job opening to which U.S. workers can be referred, and because the stated requirements are unduly restrictive of otherwise fully qualified U.S. workers. (AF 6-8).

Employer referred to its previous rebuttal in defense of the CO's contention that there was no bonafide job opening available to U.S. workers. Employer emphasized that the position was advertised as a 40 hour per week position, which pays time and a half for overtime if required, and that the Cook has an hour for lunch daily, therefore the cook works 40 hours and has five hours of unpaid lunch per week. In addition, Employer asserted that he and his wife are over 55 years of age and have eaten Romanian cuisine their entire lives. Further, he is the President of the Romanian Civic Alliance for the entire United States. Therefore, once or twice a week, he must entertain individuals from Romania as well as Romanians residing in the U.S. It is expected at these occasions that Romanian food will be served. (AF 4-5).

In the Final Determination ("FD"), the CO concluded that the application should be denied. The CO determined that no evidence was presented to prove that Employer's household has ever used a permanent full-time cook, or that circumstances had changed so that there was a present need for one. There was no evidence presented to establish the existence of a bonafide job opening to which U.S. workers can be referred, and the work requirements had not been proven to be a business necessity.

Administrative-judicial review was requested and the file was referred to the Board of Alien Labor Certification Appeals. Employer requests that the FD be reversed. (AF 1).

DISCUSSION

Twenty C.F.R. § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of §656.21(b)(2)(i) is to make the job opportunity available to qualified U.S. workers. ***Venture Int'l Assoc., Ltd.,*** 870-INA-569 (Jan. 13, 1989) (*en banc*). A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the DOT and are normally required for a job in the U.S. ***Lebanese Arak Corp.,*** 87-INA-683 (Apr. 24, 1989) (*en banc*).

In the case at bar the CO cites two restrictive requirements, (1) working a 45-hour week and (2) skill in Romanian cooking.

Requirements that are considered restrictive may be rebutted by a showing of business necessity or proof that it is common for the occupation in the U.S. ***Information Industries, Inc.***, 88-INA-82 (Feb. 9, 1989) (*en banc*). In ***Information Industries, Inc.***, this Board stated that the employer must show (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer to show business necessity.

Being skilled in cooking Romanian foods is not normal for the occupation of Domestic Cook in the U.S. but, Employer contends that he and his wife are both over the age of 55 and have eaten Romanian foods their entire lives, consequently they wish to continue doing so. Employer also states that he is the President of the Romanian Civic Alliance for all of the Romanian communities in the United States. Due to his status, he asserts that at least once or twice per week he entertains individuals from Romania as well as Romanians residing in the U.S. and is expected to provide Romanian food on these occasions. (AF 4-5).

Employer preference for Romanian-style cooking does not support the business necessity for the Romanian cooking requirement. *See* ***Linda Hwang***, 89-INA-360 (Nov. 16, 1990)**.** Furthermore, though the preference of his colleagues may support a business necessity, Employer provides no documentation that any of his associates prefer and/or expect Romanian style cooking when meeting with him. Employer merely states his position with the Romanian Civic Alliance and the expectation of providing Romanian style foods. Though this statement is credible, it is a bare assertion. Assertions by Employer constitute documentation that must be considered under ***Gencorp***, 87-INA-659 (Jan. 13, 1988) (*en banc*), but a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. ***Rajwinder Kaur Mann***, 95-INA-328 (Feb. 6, 1997). *See also* ***Splashware Company***, 90-INA-38 (Nov. 26, 1990) (evidence failed to establish why an accountant would need to speak foreign dialects to perform the job). Because there is no documentation of the preference of his constituents,

Employer has failed to establish that experience in Romanian-style cooking is a business necessity. Though the requirement might be reasonably related to the Employer's business, it is not essential to the performance in a reasonable manner, the job duties of the position in question. Moreover, Employer has not established that cooking Romanian dishes requires any specialized skill beyond the capabilities of a general domestic cook.

Therefore, the denial of this application for alien labor certification due to the unduly restrictive requirements for the position was proper In light of this conclusion, it is unnecessary to consider the other grounds given by the CO for denial.

ORDER.

Accordingly, the CO's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.